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NO. 834

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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Appellee in the above styled and numbered cause moves to Dismiss or Affirm on the ground that the questions presented are so unsubstantial as not to need further argument. The Opinion of the Mississippi Supreme Court is not set out herein since it is made an Appendix to appellant's jurisdictional statement.

QUESTIONS PRESENTED

I.

DID THE MISSISSIPPI STATUTE CONFINING JURY SERVICE TO MALES AT THE TIME OF APPELLANT'S TRIAL VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY ADMISSION INTO

EVIDENCE OF CERTAIN ARTICLES SEIZED BY TWO DETECTIVES DURING A CURSORY SEARCH OF HER HOME WITHOUT A WARRANT?

ARGUMENT

DID THE MISSISSIPPI STATUTE CONFINING JURY SERVICE TO MALES AT THE TIME OF APPELLANT'S TRIAL VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This question has been repeatedly before this Court and decided adversely to appellant since *Strauder v. West Virginia,* 100 U.S. 303, was decided in 1880 and because of the long standing doctrine and its acceptance for such a long period of time this Court refused to even discuss the question further in *Hoyt v. Florida,* 368 U.S. 57. This same question was raised as late as 1968 in an appeal to this Court in *Abraham Reed v. Mississippi,* 390 U.S. 413, wherein by a per curiam opinion this Court dismissed the appeal for want of jurisdiction. The same result was reached in *State v. Virginia Hall,* 187 So. 2d 861 (Miss., 1966), when her appeal was dismissed by this Court. *Virginia Hall v. Mississippi,* 385 U.S. 98 (1966).

APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY ADMISSION INTO EVIDENCE OF CERTAIN ARTICLES SEIZED BY TWO DETECTIVES DURING A CURSORY SEARCH OF HER HOME WITHOUT A WARRANT?

Appellant and her husband were alone in their home. She called the brother of her former husband and when he appeared at appellant's home and found the naked

dead body of Mr. Pendergraft lying on the floor with multiple cuts and stab wounds about his body, he called Mrs. Pendergraft's doctor. The doctor then called the county coroner who, in this case, was a medical doctor. It was the coroner who notified the police and two detectives were dispatched to the Pendergraft home. When they arrived they saw the body lying on the floor and saw that Mrs. Pendergraft was, as the Mississippi Supreme Court stated in its Opinion, talking "with a thick tongue and appeared to be under the influence of alcohol or drugs, that she was in a precarious mental, physical and emotional condition."

Appellant would make capital of the fact that the items of evidence complained of were found and seized by the detectives before appellant was actually arrested. It is respectfully submitted that the action of the officers in the case at bar is like that of the officers in *Harried v. United States,* 389 F. 2d 281 (1967), wherein the Court of Appeals for the District of Columbia said:

> "They are quite consistent with permissible, indeed commendable, alert observations in the course of an investigation into a murder."

The testimony in this case shows that there were telephone calls by the detectives to the district attorney and that as a result of these calls she was not arrested at that time. An effort was made to get her in a hospital but no room could be found and she was allowed to remain at home overnight with a relative and was not arrested until the next day after she had been charged with murder and a warrant for her arrest issued. As the Mississippi Supreme Court said, there was certainly probable cause to suspect her and "It follows quite logically that the only reason that the appellant was not arrested that very night was because all parties

were concerned about her doubtful condition;". Certainly such humanitarian actions on the part of the two detectives and the district attorney would not invalidate this search merely because appellant had not been formally arrested. Cf. *Warden, Maryland Penitentiary, v. Hayden,* 387 U.S. 294 (1967).

Furthermore, even if the limited search on the night of the homicide by the two detectives is not approved by this Court, the articles found as a result of this limited search were so inconsequential in view of the overwhelming evidence of appellant's guilt that beyond any shadow of a doubt any error in the admission of those articles is harmless error under the rule of *Chapman v. California,* 386 U.S. 18, reh. den., 386 U.S. 987 (1967).

CONCLUSION

For the foregoing reasons this appeal should be dismissed or the judgment of the Mississippi Supreme Court should be affirmed since there has been presented by this appeal no substantial federal questions which are deserving of the consideration of the United States Supreme Court.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*

By

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CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, five copies of the foregoing Motion to Dismiss or Affirm to Messrs. W. S. Moore and W. D. Kendall, 200 Petroleum Building, Jackson, Mississippi 39201; Honorable W. E. Gore, Jr., 500 First Federal Building, Jackson, Mississippi 39201 and Honorable James B. Tucker, 118 South President Street, Jackson, Mississippi 39205.

This the_____day of March, A. D., 1969.

_____

Assistant Attorney General